No. 22,747

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION; and LOCAL 4, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF ON BEHALF OF RESPONDENTS

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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SUMMARY OF ARGUMENT

1. The *Steelworkers* case, 378 F. 2d 33 (9 Cir., 1967) is not controlling. Despite the apparent similarity of the two cases, there are factors here which were not present in that case. This case represents an unjustified effort to extend the *Steel* case far beyond the bounds of that holding and represents, even more than it did in the *Steel* case, a serious intrusion into traditional longshore jurisdiction over commercial unloading (and loading) operations.

2. Every relevant factor demonstrates that the Board's award of the work to the aluminum workers was arbitrary and capricious: the traditional jurisdictional lines on the West Coast waterfront, the constitutions of the respective organizations, the certifications by the National Labor Relations Board, the collective bargaining contracts. To ignore all of this is to encourage turmoil not stability in labor relations.

ARGUMENT

I.

NATIONAL LABOR RELATIONS BOARD v. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (UNITED STATES STEEL CORPORATION), 378 F. 2d 33 (9 CIR., 1967), DOES NOT REQUIRE THE ENFORCEMENT OF THE BOARD'S ORDER IN THIS CASE SINCE THE UNDERLYING BOARD'S DECISION IN INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AND UNITED STATES STEEL CORPORATION, 150 NLRB 88 (1964) IS DISTINGUISHABLE FROM THE CASE AT BAR.

Any discussion of the issues of this case must start with a consideration of this court's opinion in *National Labor Relations Board v. International Longshoremen's Union (United States Steel Corporation), supra,* 378 F. 2d 33 (9 Cir., 1967), in which this court enforced a Board order in *International Longshoremen's and Warehousemen's Union and United States Steel Corporation,* 154 NLRB 1363 (1965), which, in turn, rested upon the Board's determination of a dispute reported at 150 NLRB 88 (1964).

Since this court did not undertake an independent review of the record in that case, but merely satisfied itself that the Board had considered the relevant factors and had evaluated the evidence in regard thereto (378 F. 2d at 36), it is necessary to examine the underlying Board determination to see whether it compels the enforcement of the order involved herein, or whether to the contrary, it indicates that the decision should have been in favor of the longshoremen.

In the *Steel* case, the Board was faced with what appears to have been a problem similar to the one

presented here. However, appearances, as they so often are, are deceiving and, upon close analysis, it is clear that not only does *Steel* not compel the result here sought by Alcoa and the Trades Council, but indeed compels a contrary result.

In *Steel,* the Board stated that of the many factors regarded as relevant, "some . . . weigh in favor of an award to longshoremen, some favor an award to steelworkers". We shall examine the factors referred to by the Board and shall point out that *in this case* they all compel an award to longshoremen.

1. Like the situation in *Steel,* the work in dispute here is a new operation (Tr. 33, 67-68, 89). Alumina ore had never before been unloaded from a ship at the employer's premises in Vancouver (Tr. 90).[2] However, unlike the *Steel* situation where billets had never before been unloaded by longshoremen, alumina ore and other free flowing cargo has been unloaded, *and by longshoremen,* at the adjacent port of Vancouver (Tr. 90, 220-224, 298-306).

2. In *Steel,* the Board recognized that by its constitution the ILWU asserts jurisdiction over "all workers employed in the loading and unloading of vessels, and operations incidental to such loading and unloading". That same constitution is here in evidence (ILWU Ex. 2). The Board has accorded significant weight to the clear language of a union's constitution in the past *(Local 825, International Union of Oper-*

[2]This needs to be qualified with regard to the use of barges during the Van Port flood of 1948 (Tr. 31-32; 52-53); but this situation, resulting from a natural catastrophe, was so unique as not to form any kind of precedent.

ating Engineers [*Nichols Electric Co.*], 137 NLRB 1425, 1431, 1434 [1962]); it should have done so in this case.

3. As the Board pointed out in *Steel*, "the unloading of ships on the West Coast is traditionally performed by longshoremen". Indeed, in this case, the record is clear that longshoremen have traditionally performed, and do now perform, the work of unloading free flowing cargo such as, and specifically including, alumina ore (Tr. 90, 220-224, 298-306). The Board has accorded significant weight to the factor of past practices in other cases (*International Longshoremen's and Warehousemen's Union, Local 6* [*Puget Sound Tug & Barge Co.*], 144 NLRB 1489, 1494, 1495 [1963]; *Wilkes-Barre Typographical Union* [*Llewellyn & McKane*], 148 NLRB No. 269 [1964]); it should have done so in this case.

4. The work of unloading the LYSLAND involves not only the operation of cranes, long since assigned to longshoremen by the Board (*International Longshoremen's and Warehousemen's Union* [*American Mail Line*], 144 NLRB 1432 [1963]; *International Longshoremen's and Warehousemen's Union* [*Albin Stevedore Company*], 144 NLRB 1443 [1963]; and *International Longshoremen's and Warehousemen's Union* [*Howard Terminal*], 147 NLRB 359 [1964]), *but also bulldozing of cargo in the hold of a ship* (Tr. 144), work traditionally performed by longshoremen and performed in this case *not with Alcoa's tools, but with rented longshore equipment* (Tr. 80). *This was not true in Steel.*

5. In *Steel,* the Board noted that traditional longshore jurisdiction "does not appear to be clearly established with regard to the unloading of cargo from a ship, *where both the ship and cargo are owned by an employer,* at a dock also owned by that employer and located on its premises" (emphasis supplied).[3] In the instant case, it is to be noted that the SS LYSLAND *is not owned* by the employer (Tr. 59, 92), *nor is the crew employed by the employer* (Tr. 167). It is further to be noted that the LYSLAND, unlike the SS COLUMBIA (the vessel involved in *Steel)* is not used "for the sole purpose" of carrying the alumina ore, and that, while the COLUMBIA "carries nothing on the return trip", this is not true of the LYSLAND. The LYSLAND has sailed into Vancouver with three empty holds (Tr. 72) which could be used to carry other cargo, and it has attempted to carry outbound cargo from Vancouver to be loaded by longshoremen at the public dock in that city (Tr. 50-51, 295), and its sister ship, the SS JARL RAOUL, which the company is now using in the same operation, has on the return voyage stopped at Portland, Oregon, and taken on ordinary commercial outbound cargoes of wheat loaded by longshoremen (Tr.

[3]The importance of the factors underlined, in the Board's view, is evidenced by its later Order Clarifying Decision and Determination of Dispute, dated January 11, 1965. In its original decision, the Board has held that the steelworkers were entitled "to unload *ships* at the Employer's Pittsburg Works' Dock". On the Petition for Clarification, the Board modified the foregoing language and held that the steelworkers were entitled only "to unload *the Employer's cargo from Employer's ships at the Employer's* Pittsburg Works' Dock" (emphasis supplied).

U.L.P. 33-40). This is work which has always been performed by longeshoremen exclusively (Tr. 55-56).

6. In *Steel,* the Board recognized that "neither [the steelworkers'] certification nor its contract specifically covers the work [in dispute]". This is equally true of the Trades Council's "Consent Determination of Representatives"[4] and its contract in this case (Tr. 7, 24, 27; Employer's Ex. No. 2, 4a; ATC Ex. 1). Indeed, the work in question did not even exist at the time of the 1947 consent election (Tr. 53). There were no classifications for it under the Trades Council contract until a month before the first arrival of the LYSLAND. The new classifications were established in September of 1965, in contemplation of the ship unloading operation (Tr. 96-97, 173, 185).

On the other hand, the longshore contract (Tr. 237, 275; Employer's Ex. No. 8; ILWU Ex. No. 3) and certification *(Shipowners Association of the Pacific Coast,* 7 NLRB 1002, 1025, 1041 [1938]; *International Longshoremen's and Warehousemen's Union* [*American Mail Line*], 144 NLRB 1432, 1440 [1963], both of many years standing, clearly cover the work here in dispute.

7. It would appear that a factor on which the Board relied heavily in the *Steel* case was that "longshoremen would have to be transported a considerable distance" in order to perform the work there in dispute. *That factor is not present in this case.* Here

[4]It is to be noted that such a "Consent Determination" is not a Board Certification, and for this reason, in addition to other reasons mentioned in the text, is not entitled to the same weight as a certification.

the longshoremen are available without the necessity for any traveling, they are available around the clock (Tr. 46, 226), and there is no question that they can perform the operation efficiently and economically.

8. In the *Steel* case, the employer was compelled, in order to comply with an Air Pollution Control District regulation, to shut down its open hearth furnaces (150 NLRB at 91; 378 F. 2d at 34). It therefore had to bring in the steel billets from the outside. In this case there was no such compulsion present. The employer simply chose, for reasons which seem best to it, to change its method of operation from bringing the alumina to its plant by railroad cars, to bringing it in by seagoing vessels (158 NLRB at 1026). Having chosen of its own free will to enter the business of ocean-going transportation and the unloading of waterborne cargo, the employer should not be heard to complain when the labor organization representing employees who traditionally perform such work makes a demand for it.

II.

SINCE THIS CASE IS NOT CONTROLLED BY THE STEEL CORPORATION CASE, THIS COURT IS FREE TO EXAMINE THE RECORD HERE WHICH DEMONSTRATES THAT THE BOARD'S DETERMINATION WAS ARBITRARY, CAPRICIOUS AND SHOULD NOT BE ENFORCED.

We have pointed out the significant differences between this case and *Steel*. These factors serve not only to distinguish the two cases but also show that the Board's assignment to production workers of the

tasks of operating cranes and using bulldozers to unload bulk cargo from ocean-going vessels is arbitrary and capricious and should not be enforced.

(1) The operation of cranes and the use of bulldozers to unload cargo from ocean-going vessels is traditionally longshore work. That such work constitutes a separate, unique and distinct category of work as used in Section 8(b)(4)(D) of the Act is not open to dispute.[5] Federal legislation,[6] the opinions of experienced commentators in the field,[7] and the views of concerned federal agencies[8] all attest to the fact

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[5]8(b)(4)(D) refers to the assignment of "particular work" to employees in "particular" unions, trades, crafts or classes.

[6]See, e.g., 33 USCA 901, 903 (Longshoremen's and Harbor Workers Compensation Act, setting up a special system of industrial compensation for injured longshoremen).

[7]See Petersen, HANDBOOK OF LABOR UNIONS (American Council on Public Affairs [1944]), at pages 200, 202, for a statement of historic longshore jurisdiction: "loading and unloading of all floating structures" and "loading and unloading of vessels", and at page 365, for historic steel jurisdiction: "iron and steel manufacturing, processing and fabricating".

> "A longshoreman has been defined as 'a laborer who works loading and discharging cargo' while a stevedore is 'a man in charge of the stowage of cargo and the boss of longshoremen. The stevedores are the foremen and the longshoremen are the laborers.' Bradford: A Glossary of Sea Terms (1944). The original of longshoreman appears to come from the words 'along shore'. 'Roustabouts' and 'dock wallopers' (the former, indicating laborers; the latter, loafers) are persons who handle cargo on river boats. Webster: New International Dictionary, Second Edition, Unabridged (1951)." NORRIS, MARITIME PERSONAL INJURIES, Second Edition, page 6.

[8]See U. S. DEPARTMENT OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES (Washington, D. C., 1965): "LONGSHOREMAN (water trans.) I. 911.883. Operates material-handling equipment, such as power winch, . . . crane, . . . to transfer cargo into or from hold of ship and about dock area: Operates crane or winch to load or unload cargo, such as automobiles, crates, scrap, and *steel* beams, using hook, magnet, or sling in accordance with signals from other workers." (page 432; italics supplied).

that the work here at issue is longshore work, not production work.

The work here is a longshore operation in its almost classic form. A vessel brings cargo from South America to a dock in Vancouver, Washington. The cargo is unloaded from the ship by the use of cranes and bulldozers. The workers who do this work are doing longshore work. Indeed, this court reviews dozens of cases each year in which employees who perform this kind of work are regarded as longshoremen for the purposes of the federal statutes and who, as longshoremen, derive the benefits of the doctrine of unseaworthiness and the other doctrines of the maritime law. To assign this work to production workers is arbitrary and capricious and ignores not only the standards already referred to but the criteria established by the Board itself in *International Association of Machinists (Jones Construction Co.)* 135 NLRB 1402 (1962).

(2) All the relevant factors require an award in favor of the longshoremen and therefore the court should not enforce the Board's order.

(a) The *constitution* of the International Longshoremen's and Warehousemen's Union (ILWU Ex. 2) asserts jurisdiction over employees engaged in the unloading of vessels and operations incidental thereto. There is no evidence in this record concerning the constitutional claim of the Trades Council.

(b) The basic *certification* of the International Longshoremen's and Warehousemen's Union *(Ship-*

owners Association of the Pacific Coast, 7 NLRB 1002, 1025 [1938]) covers "everyone who works [in cargo handling] either on board vessels or on the docks". It has been held to involve "in its broadest sense . . . the loading and unloading of waterborne cargo" (*American Mail Line,* 144 NLRB 1432, 1442 [1963]). It has been specifically held to include the operation of cranes (*Albin Stevedore Co.,* 144 NLRB 1443 [1963]; *Howard Terminal Co.,* 147 NLRB 359 [1964]).

What is the point of the Board issuing certifications and thereby establishing jurisdictional lines in industry, if those certifications can be disregarded by employers at a later date? The purpose of the Act is to issue stability and tranquillity in labor relations. One way the Board is supposed to do this is by certifying unions under Section 9 of the Act. If its certification can be ignored in subsequent proceedings under Section 10(k), the whole purpose of the Act is frustrated.

This is particularly true where, as here, there are no conflicting certifications. There is nothing in this record which establishes the substantive content of the Trade Council's "consent determination" (Tr. 7-10), but it is clear from the contract (ACT Ex. 1) that it does not deal with the loading and unloading of vessels.

(c) The basic International Longshoremen's and Warehousemen's *contract* (Employer's Ex. 8; Section 1.1) gives the longshoremen jurisdiction over "all

movement of cargo on vessels of any type or on docks or to or from railroad cars or barges at docks . . ."

The Trade Council's contract (ACT Ex. 1; Article 1) relates only to "the operation of the plant" and contains nothing which would justify its application to the discharge of waterborne cargo by means of cranes or bulldozers.

Collective bargaining contracts are supposed to provide for stability and tranquillity in labor relations, and if they are to be ignored in the assignment of work under Section 10(k) of the Act, then a Section 10(k) proceeding becomes a vehicle for disrupting rather than harmonizing labor relations.

(d) There is no question on this record regarding the comparative skills and abilities of the two classes of employees or their efficiency or the economy of using one group as against another. At the most, it can be said that these factors are evenly balanced.

CONCLUSION

If stability in labor relations is to be obtained, if the fruits of collective bargaining are to be retained by the employees involved, and if the objectives of the federal legislation in this area are to be properly served, this court must not enforce a Board order which would permit Aluminum Corporation of America to step outside the jurisdictional lines established on the Pacific Coast in the longshore industry. So long as the Aluminum Corporation man-

ufactures aluminum, it need deal only with aluminum workers. However, when it engages in unloading alumina from a seagoing vessel by means of conventional longshore equipment and thereby performs a conventional longshore operation, it should not be insulated from peaceful protests by longshoremen, if it assigns the work to non-longshoremen.

If the Aluminum Corporation can get away with that which it is attempting to do here, then every employer similarly situated irrespective of the product involved, can do likewise. This could result in a breakdown of longshore standards over a substantial portion of the industry on the West Coast. It could result in significant industrial strife between the longshoremen and the operators of so-called industrial docks. It could result in the breakdown of wages, hours and working conditions and the destruction of the mechanization-automation plan which has had such a hopeful beginning and which has recently received the Supreme Court's explicit approval. *Volkswagenwerk etc. v. Federal Maritime Commission,* 390 U.S. 261, 264, 278, 283 (per Harlan, J., concurring), 304-305 (per Douglas, J., dissenting in part) [1968].

This court must not permit the disruption of the industrywide automation program which the longshoremen have pioneered on the Pacific Coast. The ILWU has worked hard, and in the best traditions of constructive American collective bargaining, to set up a system which, while fair to the employers, gives the workingmen some measure of security against the in-